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Monday, August 1, 2005 | *Bits and Bytes* ™ | Volume 1, Number 12

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Award of Entire Marital Residence to Wife Appropriate Where Husband Did Not Contribute

In Herzog v Herzog, 795 N.Y.S.2d 749 (2d Dept. 2005) the husband appealed from a judgment of the Supreme Court that directed him to pay maintenance of $400 per month for 15 years, awarded the defendant wife 50% of the marital portion of his pension, denied his request for equitable distribution of the marital premises and awarded the defendant the sum of $125,000, which represented her separate property contribution towards its purchase, as well as the remaining value of the marital premises, and awarded the defendant an attorney's fee of $10,000. The judgment was modified by the Appellate Division, on the law, by reducing the length of the maintenance award to a period of four years, or until the defendant's remarriage, whichever occurs sooner, and by deleting the attorney's fee. It held that the trial court providently exercised its discretion in denying the plaintiff's request for equitable distribution of the former marital residence. While the marital residence, purchased in the joint names of the plaintiff and the defendant, was marital property, the defendant used proceeds from her separate property to purchase the residence. Therefore, there was no basis upon which to disturb the trial court's finding that the defendant was entitled to the purchase price of $125,000, which was derived from her separate property. The trial court did not find credible the plaintiff's testimony that the funds used to purchase the residence were a gift, and such determination is afforded great deference on appeal. With respect to the remaining value of the former marital residence, the court providently exercised its discretion in awarding the entirety to the wife. At trial, the plaintiff testified only to improvements he made to the former marital residence prior to the time when he and the defendant owned the property, and completely failed to substantiate any of his assertions regarding contributions to the former marital residence or the marriage. In contrast, the defendant credibly testified that she paid all expenses in connection with the residence after acquiring ownership, and supported such testimony with documentary evidence. The trial court improvidently exercised its discretion in directing the plaintiff to pay maintenance for a period of 15 years in light of the short duration of the parties' marriage. A four-year maintenance award was appropriate. It also improvidently exercised its discretion in awarding the defendant an attorney's fee under the circumstances presented.

Proper to Award Protective Order During Childs' Entire Minority

In Matter of Neail v DeShane, 796 NYS2d 435 (3d Dept. 2005) the Appellate Division affirmed a mutual orders of protection that were for the duration of the child's minority. It held that because the dispute concerned a custody proceeding under Family Court Act article 6, the duration of the orders of protection was permissible.

Forensic Report Diminished Where Not Comprehensive

In Neuman v Neuman, 796 NYS2d 403 (2d Dept. 2005) the Appellate Division held that fact that court-appointed forensic psychologist had recommended that child remain in the mother's custody did not render unreasonable Supreme Court's determination that custody should be transferred to father. The recommendations of court-appointed experts are but one factor to be considered in making a custody determination and are entitled to some weight. However, they are not

determinative and do not usurp the judgment of the trial judge. The Court noted that where, as here, the forensic report was based solely on brief interviews (many done via telephone) with the parties, the children, the mother's paramour, teachers, a rabbi, and healthcare providers, did not contain any allegation of an underlying psychological problem regarding the child, and where no standardized psychological tests were administered nor objectives articulated for the child, the utility of the report was diminished.

Admissibility of Out-of-Court Statements of Child in Custody Case

In Matter of Jacqueline B v Peter K, 796 NYS2d 518 (Fam. Ct. 2005) a custody modification proceeding the court addressed the issue of the admissibility of out-of-court statements of the child through the testimony of third-party witnesses called by the Petitioner or the Law Guardian. It noted that the petition was filed under Article VI of the Family Court Act and while the Legislature has enacted special provisions, such as FCA § 1046 to admit hearsay statements relating to any allegations of abuse and neglect to be admitted into evidence providing the statements are corroborated by "[a]ny other evidence tending to support" their reliability, no alteration of the rules of evidence had been enacted for custody matters. It noted that a body of case law had developed upholding the admissibility of a child's hearsay statements in custody proceedings where the gravamen of the application is based upon allegations of abuse or neglect, and where the custody proceeding under Article VI becomes, in effect, a substitute for the child protective proceeding under Article X. Trial and appellate courts have applied the FCA 1046 exception to custody proceedings and have admitted, when corroborated, the out-of-court hearsay statements of a child in custody proceedings, custody modification proceedings, proceedings to terminate visitation, and applications for supervised visitation. The Court held that as the gravamen of the Petitioner's application to modify the joint custody order did not allege that the father physically or sexually abused the child or that he neglected the physical, mental or emotional condition of the child by failing to exercise a minimum degree of care, statements of the child were not admissible. When, however, the Court is trying a neglect or abuse case within the context of a custody proceeding, and those acts or omissions are the predicate for making or altering a custodial determination, statements of the child pertaining to those allegations would be admissible.

Pendente Lite Order Can Be Enforced after Complaint Dismissed

In Fotadis v Fotadis, 795 N.Y.S.2d 729 (2d Dept. 2005) the Appellate Division held that Supreme Court providently exercised its discretion by, in effect, denying the plaintiff's application to extend the time to serve the complaint, since the delay was over 15 months, she failed to show good cause for it, and a meritorious cause of action. Her verified complaint which stated a cause of action sounding in constructive abandonment was submitted for the first time as part of her surreply papers. Therefore, the Supreme Court properly refused to consider it Her claim of actual abandonment was insufficient since the alleged abandonment occurred less than one year prior to the commencement of the action. However, it was error to denyplaintiff's motion for leave to enter a judgment for arrears against the defendant. Although the defendant's current obligations pursuant to the pendente lite order terminated with the dismissal of the action the defendant was required to obey the pendente lite order while the action was .Upon dismissal of the action, the pendente lite order was no longer in effect, but the plaintiff was entitled to any arrears which accrued under that order prior to dismissal and may enforce that obligation by seeking leave to enter a money judgment. And although a party may not seek to enforce a pendente lite order by way of contempt proceedings subsequent to the termination of the action, the dismissal of the complaint did not extinguish any rights which accrued under contempt orders issued prior to dismissal.

Joint Custody Awarded to Permit Hague Protection

In Matter of Ish-Shalom v. Wittmann, 797 NYS2d 111 (2d Dept. 2005) Family Court awarded custody of the children to the mother and permitted her to relocate with the children to Florida. While affirming the award which permitted the mother to relocate, the Appellate Division modified to award the mother and father joint custody, with the residence of the children to remain with the mother in Florida and with all decision-making authority to remain with the mother. Finding that the award was appropriate, the Appellate Division shared the Family Court's concern that the immigration status of the mother, a German national who entered the country on a visitor's visa, "is questionable at best." The father and a court-appointed psychologist expressed concern that the mother would return with the children to Germany, where she was licensed to practice medicine. The mother had already removed the children from New York to Florida, in direct contravention of a direction by the Family Court in open court that "neither party shall remove the children from the jurisdiction of the court." The Court found that if the mother were to return to Germany with the children, the father, as noncustodial parent, could not petition under the terms of the Hague Convention on International Child Abduction for the children's return (citing Matter of Welsh v. Lewis, 292 A.D.2d 536, 537; Croll v. Croll, 229 F3d 133, cert. denied 534 U.S. 949). The Appellate Division held that under these particular circumstances, the father should have been awarded joint custody with the mother.

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